STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2003
v	No. 233382 Lapeer Circuit Court
DEWAYNE PAUL KLAFFER, Defendant-Appellant.	LC No. 00-006936-FH

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, third-degree domestic violence, MCL 750.814, and operating a motor vehicle while under the influence of intoxicating liquors (OUIL), MCL 257.625(1)(a). The trial court sentenced defendant to 180 days in jail for felonious assault, 180 days in jail for third-degree domestic violence, and 90 days in jail for OUIL. Defendant appeals, and we affirm.

Defendant contends that the trial court erred by failing to suppress his custodial statements because he claims the statements were made in violation of his *Miranda*[1] rights. Specifically, defendant says that there was a causal link between his first suppressed statement and the second statement, both made while in custody and without benefit of a *Miranda* warning. We disagree.

Generally, statements made by an accused during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Dickerson v United States*, 530 US 428, 433; 120 S Ct 2326; 147 L Ed 2d 405 (2000); *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Daoud*, 462 Mich 621, 639-630; 614 NW2d 152 (2000). A prosecutor may not introduce custodial statements as evidence unless, before any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Dickerson, supra* at 433; *Miranda, supra* at 444; *Daoud, supra* at 633.

In contrast, the right against self-incrimination is not implicated if the accused chooses to speak in the unfettered exercise of his own will. *Malloy v Hogan,* 378 US 1, 7-8; 84 S Ct 1489;

[1] *Miranda v Arizona,* 384 US 436, 492; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

12 L Ed 2d 653 (1964); *Daoud, supra* at 632. As our Supreme Court has repeatedly recognized, "the Fifth Amendment itself protects only against compelled self-incrimination." *Daoud, supra* at 637. Therefore, if a person arrested for a crime provides information about that crime voluntarily, the statement may be used as evidence at trial. *Miranda, supra* at 478; *People v Swetland*, 77 Mich 53, 60-61; 43 NW 779 (1889); *People v Giuchici*, 118 Mich App 252, 261; 324 NW2d 593 (1982).

Here, the trial court properly admitted defendant's statement. The second admission was sufficiently separate from the first[2] so that no causal connection improperly influenced defendant's otherwise voluntary statement. *People v Coomer*, 245 Mich App 206, 222; 627 NW2d 612 (2001); *People v Spinks*, 206 Mich App 488, 496; 522 NW2d 875 (1994); *People v Malach*, 202 Mich App 266, 274; 507 NW2d 834 (1993).

Defendant also challenges the admission of the 911 tape because he says it was not properly authenticated. Specifically, defendant maintains that the voices on the tape were not properly attributed and several statements made were conclusory and hearsay. We disagree.

On proper identification, sound recordings such as a 911 tape recording may be admitted into evidence if the prosecutor demonstrates its reliability and accuracy. MRE 901 governs the authentication requirements for sound recordings and requires the proponent of the recording to provide evidence "sufficient to support a finding" that the exhibit is what the proponent claims it to be. MRE 901(a); *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). If a knowledgeable witness identifies the tape, this satisfies the foundational requirement. *Id*. at 50. In *Berkey*, the Court concluded that, as a condition precedent to admissibility, authenticity may be established by showing that it is what its proponent claims. *Berkey, supra* at 52-53.

Here, testimony from the Lapeer County 911 systems operator regarding the creation, copying, and safekeeping of the disputed tape was sufficient to show that the tape was what it was claimed to be. MRE 901(a); *Berkey, supra* at 52. Further, despite the disagreement in attributing some statements, the tape's trustworthiness is not undermined because the primary conversation on the tape was clearly audible. See generally, *People v Karmey*, 86 Mich App 626, 631; 273 NW2d 503 (1979) (tape recording may be rejected if the audio is so poor that the jury must speculate on what was said); see also *People v Parker*, 76 Mich App 432, 444; 257 NW2d 109 (1977) (unintelligible portions of tape recording not so substantial to render tape recording as a whole untrustworthy).[3]

We also reject defendant's claim that the evidence was hearsay. A statement is not hearsay if it is offered against a party and is the party's own statement. MRE 801(d)(2). Here,

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[2] Neither party requests that we address whether the trial court properly excluded defendant's first admission.

[3] The 911 tape also provided relevant, contemporaneous information regarding the events at issue and the tape was clearly probative of defendant's intent, existing mental condition, and the absence of mistake. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Further, defendant has not demonstrated that the probative value of the tape was substantially outweighed by the danger of unfair prejudice. MRE 403.

the prosecutor offered defendant's own statement against him. Defendant's comments on the tape concerning the collision were admissible as nonhearsay. MRE 801(d)(2). Moreover, even if hearsay, the statement was properly admissible as an "excited utterance" – an exception to MRE 802 – because defendant made the statement while all of the parties were under the stress of the events, as they were perceiving those events, and before they had the opportunity to fabricate. *People v Hendrickson*, 459 Mich 229, 235-239; 586 NW2d 906 (1998); *People v Slaton*, 135 Mich App 328, 334; 354 NW2d 326 (1984).

Defendant's arguments concerning the conclusory nature of the statements on the 911 tape are equally without merit. The court accommodated defendant's concerns by admitting the tape subject to defendant's continuing objection and required the prosecutor to establish the basis of the allegedly conclusory statements. While arguably conclusory, each challenged statement was identified during the respective speaker's testimony, and the basis for each statement was outlined.

Additionally, defendant argues that the trial court erred by continuing to poll the jury after a juror expressed disagreement with the verdict. We disagree.

A challenge to the court's method of polling the jury is waived absent an objection below or proof of manifest injustice. *Daniel*, *supra* at 54. Defendant not only failed to object, but also insisted that he was opposed to a mistrial and acquiesced in the court's decision to direct the jurors to resume deliberations. A party cannot request a certain action of the trial court, stipulate to a matter, or waive objection and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Further, while a forfeited right may nonetheless be reviewed for plain error, the intentional relinquishment of a right constitutes a waiver of any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant's insistence that the trial court not declare a mistrial and that the jury continue deliberations constitutes a waiver of this issue.

Similarly, though the bailiff should not have made unsolicited comments to the jury, we find that these comments do not support a finding of a real possibility of prejudice. *People v France*, 436 Mich 138, 162-163; 461 NW2d 621 (1990); *People v Gonzalez*, 197 Mich App 385, 402; 496 NW2d 312 (1992). Moreover, reversal is precluded by defendant's acquiescence to the result by insisting that the trial court not declare a mistrial, that the jury continue deliberations, and by defendant's failure to object to the bailiff's comments. *Aldrich*, *supra* at 111; *McCray*, *supra* at 14.

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood